IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
REVIEW PETITION NO.9 OF 2007
WITH
CIVIL APPLICATION NOS.107 AND 108 OF 2007

Pandurang Mukund Shelar ...Petitioner

vs.

Shrikrishna Sitaram Joshi & Anr. ...Respondents

Mr.G.R.Rege with Mrs.S.A.Mudbidri for the Petitioner in Review Petition and for the Applicant in Civil Application No.108 of 2007.
Mr.R.V.Govilkar for Respondent No.2 in Review Petition and in Civil Application No.108 of 2007.
Mr.S.G.Karandikar for Respondent No.4 in Civil Application No.108 of 2007.

CORAM: A.S.OKA,J.
DATE : AUGUST 17, 2007.

P.C.:

1. The review petition has been filed by the appellant in the second appeal who is the original defendant. The original suit was filed by the respondents in the review petition. The trial court decreed the suit by granting perpetual injunction against the review petitioner from causing obstruction to the peaceful possession and Wahiwat of the respondents over the suit property. An appeal was preferred by the present petitioner before the District Court. The said appeal has been dismissed by the District Court. By order dated 7th August 2006, Second Appeal preferred by the Review Petitioner has been dismissed.

2. The main submission of the learned counsel for the Review

Petitioner is that the respondent No.1 (original plaintiff No.1) died on 22nd April 2000 during the pendency of the suit. It is stated that the trial of the suit commenced on 10th July 2001 and the suit was decreed on 24th February 2002. It is stated that the legal representatives of the original plaintiff no.1 did not apply for bringing their names on record and therefore, the suit stood abated in so far as plaintiff No.1 is concerned. He submitted that considering the nature of the suit and the prayers made therein, as a consequence of abatement of the suit in so far as original plaintiff no.1 is concerned, the trial court could not have proceeded with the suit and the suit ought to have been dismissed.

3. Shri Govilkar for the second respondent pointed out that when the appeal was preferred by the review petitioner before the District Court, he was fully aware that the original plaintiff no.1 had expired on 22nd April 2000 and in fact a pursis was filed by the petitioner on 14th June 2004 for deleting the name of the deceased plaintiff No.1 (Respondent No.2 in the Appeal). He submitted that the petitioner did not bring on record the names of the legal representatives of the original plaintiff No.1 in the said Appeal preferred by him. He further submitted that the contentions which are sought to be raised by way of review petition were not raised by the by the petitioner in the Appeal before the District Court as well

as in the second Appeal preferred in this court though the said contention was very much available to the Review Petitioner. It is submitted that the decree passed by the trial court survives in so far as surviving the plaintiff is concerned, and considering the frame of the suit, the trial court could not have dismissed the entire suit.

4. Civil Application No.107 of 2007 is filed by the Review Petitioner praying for bringing on record the legal representatives of the deceased original plaintiff no.1. The learned counsel for the Review Petitioner stated that the petitioner is not pressing the said application. Civil Application No.108 of 2007 is filed for impleading respondent Nos.3 and 4 in the said Civil Application as party respondents to the Review Petition. It is stated in the said application that the respondent No.2 in the Review Petition and the legal representatives of the Respondent No.1 have sold the suit land to the fourth respondent in the said Civil Application on 23rd January 2007 and to the sale deed executed in favour of the fourth respondent, the third respondent is the confirming party.

5. I have also heard the learned counsel for the fourth respondent in Civil Application No.108 of 2007. He has opposed the Civil Application and has also opposed the prayers made in the Review Petition.

6. I have considered the submissions. It appears from the record that during the pendency of his Appeal in the District Court, the Review Petitioner was aware that the original plaintiff No.1 had expired on 22nd April 2000. In the pursis filed by the petitioner on 14th June 2004 in the District Court, it is specifically stated that the original plaintiff No.1 had died prior to the decision of the suit. The appeal preferred by the petitioner was decided by the District Court on 6th September 2005 i.e. more that one year after the aforesaid pursis was filed. Therefore, contentions which are now sought to be raised in the Review Petition were certainly available to the Review Petitioner in the Second Appeal preferred in the District Court as well as in the Second Appeal filed in this Court. It must be stated here that though the Review Petitioner was all along aware that the first plaintiff had died during the pendency of the suit, the said deceased plaintiff was impleaded as a party respondent in the Second Appeal. Perusal of the Memorandum of Appeal as well as the order passed by this court on 7th August 2006 shows that the said contention which is sought to be raised in the Review Petition was not at all raised.

7. A submission is made that in any event the decree passed in favour of the deceased plaintiff is nullity. It is an admitted position that before completion of the hearing of the

suit, the first plaintiff had died and therefore, the decree passed by the trial court in favour of the said plaintiff is a nullity. The main contention in the Review Petition that the suit did not survive, even in so far as surviving plaintiff is concerned. The contention is that the decree is nullity. The said contention cannot be permitted to be raised at a belated stage by filing the Review Petition. If the case of the petitioner is that the decree passed by the trial court is null and void, the said contention can always be raised as and when the decree under challenge is sought to be executed.

8. No case is made out for review and subject to what is observed above, the Review Petition will have to be rejected. In so far as C.A.No.108/2007 is concerned, the same need not be entertained as no case is made out for reviewing the Judgment and Order passed by this court.

9. Hence, I pass the following order :

i) Subject to what is observed above, Review Petition is rejected.

ii) C.A.No.107/2007 is rejected as not pressed.

iii) C.A.No.108/2007 is rejected for the reasons which are set out earlier.

JUDGE